Federal Court Cour fédérale

Date: 20160407

Docket: IMM-4648-15

Citation: 2016 FC 386

Vancouver, British Columbia, April 7, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

WAI LAN LAU AKA LAU WAI LAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench in Vancouver, British Columbia, on April 6, 2016)

[1] This is an edited version of the reasons delivered orally from the Bench on April 6, 2016. Redundancies, syntax, grammatical, clerical mistakes, errors, omissions, or any wrong reference to cases cited herein have accordingly been corrected.

I. Introduction

[2] The Applicant, Wai Lan Lau, was removed from Canada on May 18, 2011. She was denied an Authorization to Return to Canada (an "ARC") on July 17, 2012. Ms. Lau applied to have the matter judicially reviewed on October 15, 2015, some three years after the decision, and at the same time brought an Access to Information request. The Access to Information response was that the policy was that all non-immigrant files are destroyed two years after the last administrative action is taken. The Applicant's file was destroyed as per the disposition and retention schedule. Leave and the extension of time were granted on January 20, 2015. Considering the lack of evidentiary basis on this file in particular the Respondent offered to send the matter back for reconsideration.

[3] The Applicant represented herself today via telephone from Hong Kong. Her daughter Cornelia Yeung translated for her and did an excellent job. It was confirmed by the parties that there was no difficulty experienced by any of the parties regarding the translation.

[4] Ms. Lau told me of the difficulty to her family having her in Hong Kong and her three young children remaining in Canada. Ms. Lau expressed the problems with having Ms. Yeung being the primary caregiver and sole support of herself and the younger children. Ms. Yeung appears to be an amazing young person from the materials I read as well as her mother's words today. In addition to the Judicial Review hearing, prior to the hearing the parties both filed motions that it was determined should be decided by the Judge that was hearing the Judicial Review. There are some procedural irregularities and issues concerning Ms. Lau's materials that

are understandable given she is representing herself. I directed during the hearing that the motion materials were all accepted for filing without determining their weight or if they should be struck.

[5] Both parties agree in the written materials that the Judicial Review should be granted but where the parties disagree and ask me to make a decision on is what the relief should be when the Judicial Review is granted. The Respondent agreed to grant the application and to have the matter sent back for a re-determination by a new officer if the application was discontinued by Ms. Lau. That request for the discontinuation was reasonable and is not out of the ordinary.

[6] A Notice of Motion was filed by the Respondent to have the matter set aside and to be re-determined.

[7] The Applicant brought her own motion and said she would not discontinue the matter unless she was given the following relief:

a. order to set aside the decision under review;
b. an order that the ARC be issued in her name;
c. that the officers be subpoenaed to this hearing to give statements and to give statements to correct their previous false statements;
d. the Respondent was to bear the costs of her return to Canada;
e. the Respondent was to bear all costs associated with the Judicial Review as well as other relief.

[8] At the hearing, Ms. Lau asked for a determination of whether it was legal for the Consulate to destroy the application which was in Exhibit B, as well she questioned how to change the false information in the Certified Tribunal Record.

II. The Law

[9] Section 52 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) ("IRPA") states that if a removal order is enforced then that person cannot return to Canada unless authorized. If the removal order is later set aside by a Judicial Review then the return to Canada is at the Minister's expense.

[10] As the reviewing judge, I will be reviewing the Judicial Review on a reasonableness standard.

[11] The Applicant's position is that she is contesting the Respondent's finding that she is inadmissible to Canada for convictions in Canada of assault and resisting arrest, as well as contesting the convictions in Hong Kong.

[12] The Respondent acknowledges that they cannot defend this particular impugned decision as the Consulate is no longer in possession of the document of the decision being judicially reviewed and therefore agrees that the July 17, 2012 decision should be sent back for re-determination.

[13] The Respondent does acknowledge that the Court has the jurisdiction to issue directions when referring a decision back for re-determination but argues that this is rare especially when the dispute is factual in nature (*Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31 at paras 14 & 17).

III. Issue

[14] The primary objective of both parties is to have the matter sent back for re-determination and the controversy lies in whether I should issue further directions.

IV. Argument

[15] As I have now heard argument on all the matters and the relief sought in the motions filed are the same or similar enough to what is sought in the Judicial Review, I will grant the Judicial Review on the consent of the Respondent and send it back for re-determination by a different officer for the following reasons.

[16] When an extension of time is granted that spans three years after the decision and the file retention policy of the Consulate is to retain the file for two years, I agree with both parties uncontroverted position that the matter must be sent back for re-determination. With no file on these facts I believe the Applicant must be allowed to file a new application and evidence. The new application will be exempted from the fee if any there is a fee, to file the quasi- new re-determination application. Out of fairness the officer deciding this new application (the re-determination) should not be the same officer that decided the first application for an ARC.

[17] The question asked at the hearing if the file retention policy was legal cannot be answered on the materials in the Judicial Review or motions before me. But from the material that was before me it appears the file retention policy was in place and was exercised as per the policy.

[18] I do not agree that any further directions should be issued as there is no file or factual basis that I could make a determination on. This is not an appropriate case to give the relief Ms. Lau seeks other than to have the matter sent back for re-determination.

[19] I will make clear that I am not granting the ARC but only ordering that the Applicant can have another application to be determined by a different officer. There would be no further application fees. At that point she can file evidence if she has it that would support her allegation that there is false material.

[20] It follows that if I am not granting an ARC that I am not ordering that the Applicant be returned to Canada and I am not ordering that the Respondent pay for her return.

[21] The Applicant was confused about what a certified question was and subsection 74(d) of IRPA was read to her.

V. Certified Questions

[22] Ms. Lau presented three questions for certification:

A. Whether it is legal for the officer to destroy the Applicant's request for review application?
B. Whether it is legal for officers LT01098 and HS0318 to make those false statements in her file?
C. What can the Applicant do about the false information in the tribunal record because the CIC office has refused to correct the mistakes?

[23] The Respondent did not present a certified question.

[24] I will not certify these questions as they are not of general importance.

[25] There will be no costs awarded as each party will bear their own costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Judicial Review is granted and in doing so the Respondent's motion is granted and the Applicant's motion is dismissed;

2. The decision is sent back for a redetermination as follows:

   a. to be determined by a different officer;

   b. no further application cost for the Authorization to Return to Canada application

   c. New evidence may be filed by the Applicant on the re-determination

3. No question is certified;

4. No costs are ordered.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4648-15
STYLE OF CAUSE:	WAI LAN LAU AKA LAU WAI LAN v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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REASONS FOR JUDGMENT AND JUDGMENT:	MCVEIGH J.
DATED:	APRIL 7, 2016

APPEARANCES:

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Darren McLeod	FOR THE RESPONDENT

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